FOR ARGUMENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

ALABAMA POWER COMPANY, PETITIONER
*v.*
RAYMOND E. DAVIS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT

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## BRIEF FOR THE RESPONDENT

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### OPINIONS BELOW

The opinion of the court of appeals (App. 48) is reported at 542 F. 2d 650. The opinion of the district court (App. 22–45) is reported at 383 F. Supp. 880.

### JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976. The petition for a writ of certiorari was filed on September 28, 1976, and was granted on January 10, 1977. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether pension benefits, provided by an employer and computed on the basis of an employee's total years of service with the employer, are perquisites of seniority toward which a returning veteran is entitled to credit his time in the military service under Section 9 of the Military Selective Service Act, 50 U.S.C. App. 459.[1]

## STATUTE INVOLVED

Section 9 of the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, provides in relevant part:[2]

* * * * *

(b) Reemployment rights.

In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within

[1] Petitioner also sought review on the subsidiary issue whether the lower courts correctly ruled that state statutes of limitations do not apply to actions under the Act. While this case was pending on appeal, the Act was amended to provide that state statutes of limitations are not applicable to veterans' reemployment rights actions. See 38 U.S.C. (Supp. V) 2022. This Court limited the grant of certiorari to exclude this question.

[2] The veterans' reemployment provisions at issue here have recently been re-codified without significant change in 38 U.S.C. (Supp. V) 2021 *et seq.* by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93–508, 88 Stat. 1578, 1594. References in this brief will be to the provisions of Title 50 U.S.C. Appendix that were in effect at the time of respondent's retirement.



ninety days after he is relieved from such training and service * * *

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay;

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering

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the armed forces until the time of his restoration to such employment.

* * * * *

STATEMENT [3]

Respondent, Raymond E. Davis, a World War II veteran, sued his former employer, Alabama Power Company (or "Company") under the Military Selective Service Act ("Act") seeking credit for his time in the military service towards the computation of his pension benefits.[4]

The Company first employed Mr. Davis in a non-temporary position on August 16, 1936. He worked continuously until March 18, 1943, and then left the Company's employ to serve in the armed forces. On October 1, 1945, after two years and six months of military service, he was honorably discharged; on October 8, 1945 he was reinstated to his former position with Alabama Power Company. Mr. Davis continued that employment until he retired at age 61 on June 1, 1971 (App. 15).

On July 1, 1944, Alabama Power Company adopted a pension plan for its employees. The plan gave employees credit for employment prior to that date and provided for the accrual of credit based on future service. Pension benefits presently are payable from a trust fund which is funded exclusively by the Company (Plan Section IX, App. 92–93).

[3] The facts were stipulated below (App. 15–20) and are not in dispute. The pension plan, incorporated into the stipulation (App. 16), is set forth at App. 54–102.

[4] The Department of Justice represents respondent pursuant to 50 U.S.C. App. 459(d) (now 38 U.S.C. (Supp. V) 2022).



Only full-time regular employees, that is, those who work at least forty hours per week and are employed for an indefinite period, are eligible for participation in the plan (Plan Section II.1, App. 58–59; see also App. 25). Such employees become covered after they have reached their twenty-fifth birthday and have completed one year's employment with the Company (Plan Section II.1, App. 59; see App. 17). An employee normally retires at age 65 and immediately begins to receive benefits. An employee may, however, retire after reaching age 55 if he has 20 years' service and begin to receive immediate, although reduced, benefits.[5] (Plan Sections I, App. 57 and IV, App. 64–65.) Mr. Davis chose this early retirement option at age 61. An employee who quits or whose services are otherwise "terminate[d]" by the Company is ineligible for any benefits unless he has had 20 years' service with the Company (or 15 years' service if he is over age 50 at the time of termination) (Plan Section VII, App. 90).[6]

The amount of an employee's monthly benefits generally turns on the total years of "accredited service" the employee accrues prior to retirement. The plan defines "accredited service" as the total of "past service" and "future service." With conditions not

[5] An employee may work beyond the normal retirement age of 65 only at the request of the Company and with the annual approval of the Board of Directors. Plan Section IV.2, App. 64–65.

[6] Benefits for terminated employees with the requisite 15 or 20 years of service do not begin until age 65. Plan Section VII, App. 90.

here relevant, "past service" is defined as the "period of service * * * of an employee with Alabama Power Company" prior to July 1, 1944 (the date of the adoption of the plan) while "future service" is the "period of service" after July 1, 1944. Under the provision of the plan applied in Mr. Davis' case, the monthly amount of his pension is calculated by multiplying roughly one percent of the employee's monthly earnings at time of retirement by his total years of "accredited service."[7]

Time spent in military service is not included in "accredited service," except in narrow circumstances not applicable to this case.[8] Thus when Mr. Davis retired on June 1, 1971, he was denied credit for the two years and six months he served in the armed forces in the calculation of the amount of his pension. The monthly benefit of $198.95 Mr. Davis was accorded by the Company is $17.11 less than the amount he would receive were he credited with the time he spent in military service (App. 19).

[7] Davis' benefit was determined under the "Minimum Retirement Income" provision (App. 27; see Plan Section V.4. App. 68–71). This provision is utilized if the amount determined thereunder exceeds the amount to which the employee would be entitled under the standard computation. Plan Section V.1 through V.3, App. 65–68. Both methods of computation, however, are based on years of accredited service multiplied by an earnings factor.

[8] Under a 1966 amendment to the plan, a returning veteran is credited with the time spent in military service prior to his 25th birthday (the normal date on which an employee becomes eligible for the plan), less one year, App. 16, see Plan Section III.3(a), App. 61. Davis, however, was not employed by the Company prior to his 25th birthday.



This suit was filed on December 20, 1972. The complaint (App. 5–6) alleged that Alabama Power Company was required by the Act to credit Mr. Davis with his two years and six months of World War II military service in the calculation of the amount of his pension benefit due upon his retirement. The district court entered judgment for Davis (App. 45–46).

The district court concluded that "[t]here can be no question that the computation [of pension benefits] is based upon seniority" (App. 30) and that denying Davis credit for his military service would violate the Act's requirement that returning veterans be accorded the seniority they would have earned but for their absence. The court found that the purpose of the pension benefits was "to promote personnel stability by giving employees an incentive to remain with the company" (App. 32) and that there was no evidence that the benefits were "based upon any 'unit of work' requirement" (App. 35). The district court also held that the plan could not be defined as "other benefits" under the Act so as to deny Davis credit for his military service (App. 35–36).[9] It ordered the company to increase Davis' pension accordingly, retroactive to the date of retirement.

[9] The district court rejected Alabama Power Company's arguments that the plan was a "gratuity" (App. 36–38), that credit for military service would impair the Company's constitutional rights (App. 38–39), and that Mr. Davis' claim was barred by the statute of limitations or by laches (App. 39–45). Petitioner does not challenge these rulings. See note 1, *supra*.

A divided panel of the court of appeals affirmed *per curiam* "on the basis of the well-reasoned opinion" of the district court (App. 48–49).[10]

## SUMMARY OF ARGUMENT

The Military Selective Service Act requires that an employer reinstate a veteran returning from military service to the job the veteran held prior to his departure; the veteran, furthermore, is to be reinstated "without loss of seniority". This provision requires that the veteran receive seniority credit for his military service so that, upon his return to the job, he stands in the same place on the seniority escalator as he would have stood had he remained on the job without interruption.

This Court has interpreted the Act liberally in favor of the veteran, refusing to limit the Act's protection only to those benefits considered as seniority rights by tradition or by the collective bargaining agreement. The Court has looked to the "real nature" of the benefit to determine if it is a perquisite of seniority or simply a short-term form of deferred compensation made in return for the performance of work. Thus, for example, where severance pay is measured, as a practical matter, by length of service, the amount of such pay is a perquisite of seniority and the employer

[10] In his dissenting opinion, Judge Roney cited the decisions of the courts of appeal for the Third and Tenth Circuits which held that pension benefits are not perquisites of seniority under the Act. *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (C.A. 3); *Jackson* v. *Beech Aircraft Corp.*, 517 F. 2d 1322 (C.A. 10).



must therefore include the employee's military service in computing the amount to which he is entitled. On the other hand, conventional vacation benefits which accrue annually to employees are considered a form of compensation which the seniority protection does not reach.

Pension benefits, by their very nature, are based on length of service rather than on the amount of work performed. The benefits are intended to provide financial security for the retiree and, by encouraging lengthy service, pension plans serve legitimate needs of the employer, the most important of which is the development of an efficient, productive and stable work force. The employer thus holds out to the employee the prospect of financial reward, not in return for the day-to-day service for which the employee receives wages and other short-term benefits, but in return for the employee's dedication of all or a great part of his productive years to the employer's service. The benefits are measured by the length of service, not by the work performed in the process.

The inherent nature of the pension as an incentive for, and reward for, continuous service is demonstrated by the plan in the case. An employee must work 15 or 20 years, depending on his age, before he is entitled to receive any benefit whatever under the plan, and full benefits require service until age 65. A worker who dies before retirement without a surviving spouse receives nothing under the plan. Furthermore, in computing the amount of benefits, the plan disregards actual overtime work performed and

conversely, includes non-working time spent on vacations, holiday, and sick leave.

These aspects of the plan demonstrate that the employees' benefits are premised on time spent on the payroll, rather than on the work actually performed. They reinforce the conclusion that Davis' time spent in military service, but for which he would have been receiving credit toward his pension, must be included in determining his pension benefits.

## ARGUMENT

### PENSION BENEFITS CONSTITUTE PERQUISITES OF SENIORITY UNDER 50 U.S.C. APP. 459

#### A. IF AN EMPLOYEE BENEFIT IS BY ITS "REAL NATURE" A PERQUISITE OF SENIORITY A RETURNING VETERAN IS ENTITLED TO HAVE HIS TIME IN THE MILITARY SERVICE COUNTED TOWARD ACCRUAL OF THAT BENEFIT IRRESPECTIVE OF WHETHER THE COLLECTIVE BARGAINING AGREEMENT CONDITIONS THE ACCRUAL OF THE BENEFIT ON A SUBSTANTIAL WORK REQUIREMENT

In passing the Nation's first peacetime draft law in 1940 (54 Stat. 885), Congress determined that "he who is called to the colors is not to be penalized on his return by reason of his absence from his civilian job." [11] Congress therefore provided, in what was later codified as 50 U.S.C. App. 459(b)(A)(i),[12] that a veteran who left a civilian job must, upon return, "be restored [by his employer] * * * to such position or to a position of like seniority, status and pay." Congress also provided, in what became 50 U.S.C. App.

[11] *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 170–171; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284.

[12] Now 38 U.S.C. (Supp. V) 2021(a).



459(c)(1),[13] that the veteran was to be restored to his job (or to one of "like seniority, status and pay") "without loss of seniority." Congress further required that the returning veteran be allowed to "participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence."

The Act thus distinguished between benefits derived from seniority, to which the returning veteran was entitled as of right, and "insurance or other benefits," to which the veteran was entitled only to the extent such benefits were provided to employees on nonmilitary leave of absence. But the Act provided no definition of seniority or of "other benefits." [14]

In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, this Court construed for the first time the Act's requirement that a veteran be reinstated "without loss of seniority," and concluded that the employee does not simply retain his seniority but adds to it while in the military service (*id.* at 284–285):

> [The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * * * * * * *

[13] Now 38 U.S.C. (Supp. V) 2021(b)(1).

[14] Congress' primary purpose in passing the Act was to draft men for military service. The reemployment provisions received secondary attention. See Note, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 123, 148 (1966).

> He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.

In so holding, the Court emphasized that the Act was "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.* at 285; see *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 181.

In its reenactment of the statute in 1948, Congress expressly approved this "escalator principle" and incorporated it in what became 50 U.S.C. App. 459 (c)(2).[15] See *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 271; *Tilton* v. *Missouri Pacific R. Co., supra*, 376 U.S. at 175. That section provides that a returning veteran should be restored to his employment:

> * * * in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

Protection against lay-off, to which the Court applied the escalator principle in *Fishgold,* was a right or benefit traditionally regarded as an attribute of seniority. In the years following the *Fishgold* decision, the escalator principle became firmly established in regard to other traditional seniority perquisites, such as order of promotion and priority with respect to job assignments. See, *e.g., Tilton* v. *Missouri Pacific*

[15] Now 38 U.S.C. (Supp. V) 2021(b)(2).



*R. Co., supra.* Questions remained, however, whether the rule should be applied to other benefits which, although part of the consideration bargained for in collective bargaining negotiations, had not traditionally been considered a part of "seniority" rights. If all such fringe benefits were considered "insurance or other benefits" under 50 U.S.C. App. 459(c)(1), the returning veteran would not be entitled to apply the time he spent in the military service towards the accrual of any fringe benefits, except to the extent his employment contract might provide fringe benefits to employees on non-military leaves of absence.[16]

In *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, the Court rejected this narrow view and extended the Act's protection to severance pay, a benefit "not traditionally considered a seniority right." *Foster* v. *Dravo Corp.*, 420 U.S. 92, 97. Under a collective bargaining agreement involved in *Accardi*, each discharged employee was paid a separation allowance according to a formula based upon the length of his "compensated service" with the railroad. The rail-

[16] A number of lower courts addressing this issue in the wake of *Fishgold* concluded that only traditional seniority rights, stemming from the relative position among all employees within a specific job group determined by the length of service with the employer, were protected by the escalator principle, while fringe benefits derived by collective bargaining and awarded on the basis of a "continuous service" requirement were automatically deemed "other benefits". See, *e.g. Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (C.A. 2); *Seattle Star* v. *Randolph*, 168 F. 2d 274 (C.A. 9); *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (C.A. 6), certiorari denied, 340 U.S. 875; *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (C.A. 2).

road argued that time spent in military service need not be included as compensated service because severance pay was not based on seniority—as indeed under the terms of the agreement it was not. But the Court concluded that the severance payments were made in return for the surrender of jobs and that the amount was primarily based on the employee's length of service with the company. Thus, the Act required that time spent in military service be included; the amount of severance pay was, in the Court's view a perquisite of seniority "no matter how calculated," and those who had the most seniority received the highest allowances. 383 U.S. at 230.[17]

Following *Accardi*, employers defending veterans' suits brought under the Act attempted to distinguish that case by showing that benefits were based upon a substantial work requirement measured in days or even hours and therefore were not perquisites of seniority.[18] But such a distinction involves the untenable proposition, as the court pointed out in *Palma-*

[17] The Court also drew support for its conclusion that the severance pay was not based on actual work performed by the "bizarre results" that the formula could produce—theoretically, an employee could earn a year of "compensated service" by working one day per month for seven months. The Court did not suggest, however, that the coverage of the Act depended on whether a bizarre result could be shown in future applications.

The Court also laid to rest the notion that simply categorizing the severance pay as "insurance or other benefits" could deprive the veteran of inclusion of his time in military service in calculating the amount of the benefit. That clause, said the Court, "was intended to add certain protections to the veteran and not to take away those which are granted him by [the statutory protection of seniority]." *Id.* at 232.

[18] See Comment, *Veterans' Reemployment Rights: Severance Pay*, 1974 Wash. U. L. Q. 296, 303.



*rozzo* v. *Coca-Cola Bottling Co.*, 490 F. 2d 586 (C.A. 2), certiorari denied, 417 U.S. 955, that the Act's protection of veterans' seniority and perquisites of seniority could be defeated by collective bargaining agreements that "redefine a benefit simply by making it contingent on work time rather than seniority." 490 F. 2d at 592. "To say that severance benefits accruing with years of service are protected under the Act as perquisites of seniority as the Court said in *Accardi* and then to make those rights contingent on the extent to which the union incorporates work requirements as a condition for receipt of benefits would render the Act entirely nugatory * * * because any perquisite of seniority can be based upon actual work hours rather than length of employment." *Ibid.* Since "promotion or lay-off preferences could [not] be contingent on work requirements, rather than length of service, without violating the Act," neither should the veteran's eligibility for severance pay based on years of service be limited because eligibility was expressed in terms of a work requirement. *Ibid.*

What matters, then, is the functional nature of the benefit at issue. As the Court stated in *Foster* v. *Dravo Corp., supra,* 420 U.S. at 97, "benefits and advancements that would necessarily have accrued by virtue of continued employment" if the veteran had not entered military service are protected, regardless of whether the benefit had been "traditionally considered a seniority right." In *Foster,* the Court rejected the veteran's theory that an employee who served in the Armed Forces was nonetheless entitled to accumulated

vacation benefits when he returned to his employer, a theory "sharply inconsistent with the common conception of a vacation as a reward for and respite from a lengthy period of labor." *Id.* at 101." The Court thus refused to award such benefits in the absence of a clear showing that vacations were, like the severance payments in *Accardi,* "intended to accrue automatically as a function of continued association with the company." *Ibid.*

The Court's decisions from *Fishgold* through *Accardi* and *Foster* provide the framework for determining whether a particular fringe benefit is covered by the seniority provisions of the Act, which are to be "liberally construed for the benefit of those who left private life to serve their country." *Fishgold, supra,* 328 U.S. at 285. Instead of relying upon "technical definition[s]," *Accardi, supra,* 383 U.S. at 229, or "narrow characterization * * * in the collective-bargaining agreement," *Foster, supra,* 420 U.S. at 98, the Court will look to the "real nature" of the benefit to determine whether the Act's seniority provisions protect it. *Accardi, supra,* 383 U.S. at 230. If the benefit provides, in return for actual work performed, a current return, either in the form of actual payment or immediate vesting (*e.g.,* vacation benefits), then the benefit is "a form of short-term compensation," *Foster,*

[19] The Court found it significant that employees who worked overtime drew additional vacation benefits, which increased as the amount of overtime increased, and that an employee who was laid off before accumulating 25 weeks' work nonetheless earned vacation benefits on a pro rata basis. 420 U.S. at 100.



*supra,* 420 U.S. at 100, and not protected against loss by the Act. On the other hand, if the benefit primarily rewards the employee for length of service, rather than for actual work performed, *Accardi, supra,* then the benefit is a perquisite of seniority and the veteran's entitlement to it cannot be defeated by a substantial work requirement. See *Palmarozzo, supra,* 490 F. 2d at 591–592.

As we show below (Sections B and C), under this test Davis' pension is a perquisite of seniority and the Act requires the Company to count his military service as time on the job for purposes of his pension.

### B. PENSION BENEFITS ARE BASED UPON LENGTH OF SERVICE RATHER THAN ON WORK ACTUALLY PERFORMED AND ARE GIVEN IN EXCHANGE FOR THE EMPLOYEE'S LOSS OF HIS JOB RATHER THAN AS SHORT-TERM COMPENSATION.

The pension plan in this case focuses not on actual work performed but on the employee's long association with the company, to the end that the employee has a measure of financial security in his later years. A pension's "real nature" in this latter respect is "compensation for loss of jobs," and thus under *Accardi* the amount of the benefit is a "perquisite of seniority." 383 U.S. at 230.

Although "it is doubtful that the private pension movement can be explained in terms of any one social or economic philosophy," [20] there is a "growing realization or conviction that any employer who utilizes the services of an employee for an extended period

[20] McGill, *Fundamentals of Private Pensions* 20 (3d ed. 1975).

of time has an obligation to make some contribution toward the individual's retirement needs." [21] Pension plans not only represent economic security for the retiree, but serve a variety of legitimate purposes of the employer in ways that short-term wages and benefits do not. Companies with pension plans can attract more desirable employees, especially at the supervisory or executive level, than companies without such plans.[22] Pension plans are believed by many employers to be "a means of inducing long service and employee identification with the employer," [23] to enhance the morale of employees by reducing worry about financial security in old age,[24] to reduce employee turnover and retraining costs [25] and to provide recognition of the "special contributions, not reflected in wage payments, of a long-service employee to the

[21] McGill, *supra*, at 18. The importance of pensions was recognized by Congress when, in enacting the comprehensive Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat, 832, 29 U.S.C. (Supp. V) 1001 *et seq.*, that body found that "the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial." 29 U.S.C. (Supp. V) 1001 (a). There can no longer be any question but that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans." *Ibid.* Some 30 million workers—almost half the nonagricultural work force—are now covered by some form of private pension plan. H.R. Rep. No. 93–533, 93d Cong., 1st Sess. 3 (1973).

[22] O'Neal, *Stockholder Attacks on Corporate Pension Systems*, 2 Vand. L. Rev. 351, 357 (1949); McGill, *supra*, at 22–23; *Whitley* v. *Mammoth Life and Acc. Ins. Co.*, 273 S.W. 2d 42, 43 (Ky. Ct. App.).

[23] Bernstein, *The Future of Private Pensions* 11 (1964).

[24] O'Neal, *supra*, at 357.

[25] McGill, *supra*, at 22.



firm," such as the transmission of skills from experienced workers to younger ones.[26]

The most important and widely agreed on benefit of a pension plan is its central role in promoting the efficiency of the labor force; employees who retire after long service not only step aside with a measure of financial independence but by doing so open the channels of advancement for younger workers, thus improving morale and stability at all levels of the organization.[27] In order to develop an experienced, productive and stable work force, the employer thus holds out to the employee the prospect of financial rewards at the end of lengthy service, not in return for his day-to-day work—for which he is paid wages and short-term benefits such as vacations—but for the longevity of his service, the simple return to the job day after day, week after week, year after year.[28]

Pension benefits serve a function analogous to the severance allowance involved in *Accardi*. There, severance resulted from elimination of the employee's position. Here, the position continues but the employee is required to surrender it to a younger worker. From the retiree's standpoint there is no difference——he

[26] *McGill*, *supra*, at 20.

[27] *Id.* at 20–21. See 29 U.S.C. (Supp. V) 1001(a).

[28] See *Hunter* v. *Sparling*, 87 Cal. App. 2d 711, 724–725, 197 P.2d 807, 815; *Wilson* v. *Rudolph Wurlitzer Co.*, 48 Ohio App. 450, 194 N.E. 441; *Cantor* v. *Berkshire Life Ins. Co.*, 171 Ohio St. 405, 408–409, 171 N.E. 2d 518, 521; *Bird* v. *Connecticut Power Co.*, 144 Conn. 456, 462–463, 133 A.2d 894, 897; *Schofield* v. *Zion's Co-Op. Mercantile Inst.*, 84 Utah 281, 39 P.2d 342; *Hughes* v. *Encyclopedia Brittanica*, 1 Ill. App. 2d 514, 117 N.E. 2d 880; *Texas & N. O. R. Co.* v. *Jones*, 103 S.W. 2d 1043, 1046 (Tex. Civ. App.); cf. *Alexander* v. *Fioto*, No. 75–1704, decided April 4, 1977, slip op. 6.

loses his job.[29] "And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job." *Accardi* v. *Pennsylvania R. Co. supra,* 383 U.S. at 230. When the employee is permitted to work no longer, he is entitled under the pension plan to exchange his accumulated seniority for monthly retirement payments.

The Court has recognized the direct correlation between seniority and pension benefits. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, an employment discrimination case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5, the Court concluded (*id.* at 765) that the statute empowered federal courts to award discrimination victims a "seniority remedy slotting the victim in that position in the seniority system that would have been his" but for the discriminatory hiring practices.[30] The Court made clear that an award of seniority encompassed such benefits as "length of an employee's vacation [31] and pension benefits."[32] 424 U.S. at 767 (footnotes omitted).

[29] In this case, Davis was not forced to give up his job when he did; he could have remained another four years, to age 65. But the mandatory loss of his job was in sight, and his early retirement merely anticipated the inevitable.

[30] The Court analogized the remedy available under the Civil Rights Act to awards of retroactive seniority under the Military Selective Service Act. 424 U.S. at 778.

[31] Compare *Foster* v. *Dravo Corp.*, *supra*, 420 U.S. at 101, n. 9.

[32] While the Court was divided on the degree to which federal courts could award "competitive" seniority relief, such as order of layoff and recall, it unanimously approved the restoration of "benefit type" seniority relief such as pension benefits.



Alabama Power Company argues, however, that the pension benefits Davis claims are not given in return for long service but are, like the vacation benefits in *Foster,* a form of compensation for actual work performed (Pet. Br., pp. 12–20). But the theory that a pension is simply deferred wages or compensation (Pet. Br., p. 18) is indeed a "tenuous" one where, as here, the employee's right to the pension is not immediately vested:[33]

[33] *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (C.A. 3), and *Jackson* v. *Beech Aircraft Corp.*, 517 F. 2d 1322 (C.A. 10) were wrongly decided because the decisions rested on the view that pensions were simply deferred compensation and thus those cases are erroneous. *Litwicki* relied on *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 248–255 (C.A. 7), certiorari denied in part, 336 U.S. 960, affirmed on other grounds *sub nom. American Communication Ass'n* v. *Douds*, 339 U.S. 382, which held that pension plans were "wages * * * or other conditions of employment" subject to mandatory bargaining under the National Labor Relations Act (NLRA). See *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186, 1188 (C.A. 7), certiorari denied, 404 U.S. 939. The fact that a fringe benefit may be classified as "wages" under the NLRA is not indicative that the benefit constitutes actual wages for purposes of the Military Selective Service Act. See *United States* v. *Embassy Restaurant*, 359 U.S. 29, 33, where the Court held that an employer's payments to a union welfare fund, though "wages under the N.L.R.A." for bargaining purposes, were not "wages" under the Bankruptcy Act.

*Litwicki* also found significant the pension plan's requirement that a year's accredited service required 1,500 hours' actual labor in the plant. But, as we have already shown, the presence of a work requirement expressed in hours or days cannot determine the outcome for purposes of the Act. Such an approach overlooks the fact that even the most traditional seniority benefits can purport to be based on a substantial work requirement, thereby defeating the purpose of the Act to protect true seniority benefits, regardless of label. See *Palmarozzo* v. *Coca-Cola Bottling Co.*, *supra.* Finally, *Litwicki* relied on the Report of the Senate Subcommittee on Wel-

> From the standpoint of an individual participant, this [deferred wages] concept has validity only if the funds paid into a pension plan in lieu of a personal wage increase are administered in such a manner as to ensure their ultimate payment to him or his beneficiary in one form or the other. This implies full and immediate vesting of employer contributions on behalf of current participants, a practice rarely encountered among industrial pension plans.[34]

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fare and Pension Funds, S. Rep. No. 1734, 84th Cong., 2d Sess. 3 (1956), for the proposition that pension benefits should be viewed as deferred wages under the Act. When read in context, however, the Report shows that the Subcommittee was attempting to illustrate only that employees had an interest in the management of company pension plans. The Report is not probative on the question presented in this case.

*Jackson* followed *Litwicki* and its result is erroneous for the reasons noted above.

We also believe the Ninth Circuit's decision in *Smith* v. *Industrial Employers and Distributors Ass'n*, 546 F. 2d 314, is incorrect insofar as it ruled that veterans are not entitled to count their time in the military in computing future service under the company's pension plan. In our view, the Ninth Circuit's premise that it was not required to examine the "general function of pension benefits," 546 F. 2d at 318, was unsound. The crucial inquiry, and the one the Ninth Circuit failed to undertake, was whether the benefits compensate for short-term labor or, on the other hand, primarily reward length of service.

[34] McGill, *supra*, at 19. (Professor McGill was the Chairman of the Pension Research Council of the Wharton School, University of Pennsylvania.) See also *Knoll* v. *Phoenix Steel Corp.*, 465 F. 2d 1128, 1131 (C.A. 3), certiorari denied, 409 U.S. 1126; *Connell* v. *United States Steel Corp.*, 516 F. 2d 401, 408 (C.A. 5); Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. Chi. L. Rev. 96, 103 (1955) ("[U]nder the deferred wage analysis the employee's rights vest as soon as he earns the amount contributed or set aside for his benefit.").

The absence of a precise wage equivalency—funding of the plan at the rate of $x$ cents per hour of labor—further undercuts



### C. THE PLAN IN THIS CASE REWARDS LENGTHY SERVICE RATHER THAN WORK ACTUALLY PERFORMED

The particular provisions of Alabama Power Company's pension plan further confirm that the benefits under it are given in exchange for the rights and benefits the worker surrenders along with his job, rather than "as a form of short-term compensation for work performed." *Foster* v. *Dravo Corp., supra,* 420 U.S. at 100.[35] Under the plan, an employee who leaves the Company for reasons other than retirement before completing 20 years of service (or 15 years of service if he has reached his 50th birthday) cannot receive any benefits under the plan (Plan Section VII, App. 90). An employee with less than 15 or 20 years' service who is laid off by the Company and is not recalled within one year forfeits all accumulated service he has theretofore gained and is "considered a new employee" for pension purposes if later called back to work (Plan Section III. 4, App. 62–63). If an employee dies before reaching retirement age and leaves no surviving spouse, neither his family members nor

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the deferred wage concept. McGill, *supra*, at 20. There is no express or implied wage equivalency in the instant plan. See Section G, *infra*.

[35] It is possible to imagine a pension plan that awards benefits based strictly on actual work performed, as where a clothing manufacturer contributes a certain amount to the fund for each pair of pants a worker produces, or where an employer contributes a certain amount for each hour the employee is actually on the job and no more, and the employee is guaranteed of receiving the monies at any time, with no contingency. Only in the event of "precise wage equivalency" and "full and immediate vesting" as described above could such a plan be considered a form of compensation. See McGill, *supra*, at 19, and note 34, *supra*; U.S. Department of Labor, *Veterans' Reemployment Rights Handbook* 97 (1970).

his estate receives any pension benefits, no matter how long he worked for the company.[36]

These provisions contrast sharply with the vacation benefits in *Foster,* where the Court 's conclusion that the benefits were a form of short-term compensation was based in part on the fact that an employee who was laid off prior to becoming eligible for full benefits nonetheless received pro rata benefits. There is no "pro rata pension" for the employee with less than 15 or 20 years' service with Alabama Power Company. A pension benefit is not the functional equivalent of wages or a form of deferred compensation if an employee can work for the Company for 14 or 19 years and receive nothing under the plan, or if an employee can work thirty, forty, or more years and his estate receive nothing if he dies before retiring.[37]

[36] Plan Section V.9, App. 74. The "provisional payee" referred to in Section V who is to receive payments after the employee's death must be a surviving spouse. Plan Section I, App. 57.

[37] It was in part to mitigate the harsh results caused by lengthy vesting requirements that Congress enacted the Employment Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. (Supp. V) 1001 *et seq.* (ERISA). Under ERISA a pension plan must meet one of three minimum vesting standards designed to provide employees with, generally, a vested right to accrued benefits after 10 to 15 years' service, depending on the standard adopted by the plan. See 29 U.S.C. (Supp. V) 1053. However, as to plans in effect at the time of its enactment, ERISA applies only to plan years beginning after December 31, 1975. 29 U.S.C. (Supp. V) 1061(b)(2). Moreover, this relaxation of vesting rules does not, in our view, change the nature of pension plans from a perquisite of seniority to a benefit based on a substantial work requirement for purposes of Section 9 of the Military Selective Service Act. See note 35, *supra.*



Further evidence that the plan is based on lengthy service rather than on the performance of actual work as such is found in the plan's treatment of accredited service as applied to vacations, holidays and sick leave, on the one hand, and to overtime work on the other. Under the plan, an employee receives "accredited service" for substantial periods of time when he is performing no actual work—from two to five weeks' annual vacation, eight holidays and annual sick leave of ten work days per year (App. 18). In some circumstances, employees can take extended sick leave of up to nine months with pay, accumulating accredited service all the while despite performing no actual work. Even if the employee does not use the extended sick leave allowance, if he takes a vacation each year for 30 years, plus holidays and normal sick leave, he is away from work for more than 1000 days, or the working equivalent of 48 months,[38] yet earns full accredited service for those entire 48 months.

Conversely, overtime work does not constitute "accredited service" under the plan (App. 18). The record does not reflect how much overtime Davis worked in his thirty-two year career with Alabama Power Company. But if, for example, he worked overtime only one day per month during his employment, this would yield 384 days, or more than 18 months of actual work performed without earning a single day's "accredited service." This presents another con-

[38] Based on 21 working days per month.

trast with *Foster,* where the Court noted that vacation benefits increased as overtime increased.

These results, when considered in conjunction with the absence of vesting prior to 14, 19 or even more years' work, are persuasive evidence that accredited service under the plan is not a function of actual work performed but of length of service with the Company."

Of course, under this pension plan, like many others, an employee necessarily performs a great amount of work while accumulating 30 years' or more seniority. But contrary to petitioner's argument (Pet. Br., pp. 16–18), one cannot conclude from this fact alone that the benefits are earned in return for the work actually performed. The Court's inquiry must go further.

In *Foster*, the Court concluded that the "real nature" of vacation benefits was a "reward for and respite from a lengthy period of labor," 420 U.S. at 101, a conclusion supported by the fact that, aside

[39] Pension plans whose work requirements are expressed in hours are susceptible to the same criticism when denial of veterans' credit is based on the "substantial work requirement" theory. See, *e.g.*, *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189, 193 (C.A. 3) (1,500 hours); *Smith* v. *Industrial Employers and Distributors Ass'n*, 546 F. 2d 314, 316 n. 4 (C.A. 9) (1,500 or 1,730 hours); *LaPinta* v. *Ohio Crankshaft Div.*, 77 CCH Labor Cases ¶ 11,156, decided September 26, 1975 (N.D. Ohio), appeal pending, C.A. 6, No. 76–1158 (1,700 hours). Even after taking into consideration normal vacation, sick leave and holiday time not worked, 200 or more straight-time hours can be worked each year without additional credit. Over a period of 30 years, 6000 hours, or three working-years, goes uncompensated.



from contrived and unrealistic possibilities, the amount of the benefits reflected the work actually performed. Similiarly the Court must focus in the present case on the "real nature" of the pension, which as we have shown, is designed to provide financial security to a retiree in return for lengthy service and the surrender of his job. As such, the increase in pension benefits "would necessarily have accrued by virtue of continued employment," *Foster, supra,* 420 U.S. at 97, and is thus a perquisite of seniority. This conclusion is supported by the absence of vesting prior to 15 or 20 years of service and the fact that, since benefits in this plan reflect the length of service quite accurately, and the actual number of days or months on the job much less accurately, the benefits reward lengthy service rather than work actually performed.

There is a further significant distinction between the highly conditional long-term nature of pension payments and the short-term nature of the vacation payments at issue in *Foster*. An individual on active duty in the military receives from the government paid vacation time as well as other benefits that are rewards for day-to-day work for the United States.[40] Thus even though the Act does not as a rule [41] protect amounts of vacation pay the veteran would have earned at the plant had he not been in the

[40] See, *e.g.*, 10 U.S.C. (and Supp. V) 701.

[41] See *Foster*, *supra*, 420 U.S. at 101, in which the Court noted that vacation pay would be covered by the Act under circumstances where "it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company."

armed forces, the returning veteran has not lost any ground by virtue of his military service. In fact, the award of vacation pay could result in a double benefit."

Pensions, however, present a different face. The Act protects only employees whose military service is brief." While Congress has granted long-term members of the military pension benefits," Congress has provided no equivalent benefits to returning veterans whose period of service is sufficiently brief to qualify for coverage under the Act.

In sum, as the Court stated in *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 766, "'[m]ore than any other provision of the collective [-bargaining] agreement * * * seniority affects the economic security of the individual employee covered by its terms.'" Long term economic security is precisely what a pension provides. To obtain this security an employee must remain in the continuous service of his employer for a substantial number of years, often his entire working life. If a returning veteran reaches retirement age but is denied a measure of that

[42] See *Foster* v. *Dravo Corp.*, 490 F. 2d 55, 63 (C.A. 3); *Austin* v. *Sears, Roebuck and Co.*, 504 F. 2d 1033, 1037 (C.A. 9); *Smith* v. *Industrial Employers and Distributors Ass'n*, 385 F. Supp. 1281, 1286–1287 (N.D. Cal), affirmed on other grounds, 546 F. 2d 314 (C.A. 9).

[43] Reemployment rights under the Act are only available to persons whose total service up to and including August 1, 1961 did not exceed four years and whose total service after August 1, 1961 does not exceed five years. 38 U.S.C. (Supp. V) 2024(a), formerly 50 U.S.C. App. 459(g)(1). See *Foster, supra,* 420 U.S. at 96, n. 6.

[44] See, *e.g.*, 10 U.S.C. (and Supp. V) 1332, 1401.



security awarded to his counterparts who were never "called to the colors" he will have been "penalized" [45] by reason of his absence. That is precisely the result the Act was intended to prevent. Unless the returning veteran's pension credits are restored he "will never obtain his rightful place in the hierarchy of seniority * * *." 424 U.S. at 768."

[45] See *Fishgold, supra,* 328 U.S. at 284.

[46] See Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases,* 60 Minn. L. Rev. 45, 74 (1975) (footnotes omitted):

> The essence of *Fishgold* and the escalator clause is recognition of the unfairness of removing a person from his job, interfering with both his short- and long-term interests, satisfying the former, but doing nothing about the loss of latter. The statute therefore should be construed to require the veteran's employer to provide long-term benefits as if the veteran had earned them, even though a collective bargaining agreement may have conditioned their receipt on time actually worked.
>
> Such a construction of the statute would unify many previous attempts to determine the intent of Congress. It responds to the statement in *Fishgold* that the veteran should not "lose ground" by reason of his absence from civilian employment. The notion of losing ground points to long-term benefits. A loss of short-term benefits—a vacation in a particular year, for example—does not comport with the "loss of ground" image. Rather, the metaphor suggests that workers, especially younger ones customarily subject to military service, are engaged in building something for the future. The "race" in which ground is lost is the attempt to establish a secure future. This secure future is precisely what is meant by long-term benefits.

Under this approach, the veteran's pension benefits must be credited with the period he was called from his job:

> Failure to credit the veteran for service years [in computing pension benefits] will damage him irrevocably vis-a-vis his fellow employees who did not serve in the military. The underlying premise of the long-term/short-term approach is that Congress intended to preclude all such damage that might result from interruption of employment due to brief military service.

Silver, *supra,* at 78 (footnote omitted).

D. THE RECORD DOES NOT SUPPORT ALABAMA POWER COMPANY'S CLAIM THAT CREDITING OF MILITARY SERVICE WILL SIGNIFICANTLY ADVERSELY AFFECT THE SOUNDNESS OF ITS PLAN

Alabama Power Company suggests that a ruling in favor of the veteran "could have a significant impact upon the actuarial soundness of Alabama Power's pension fund, as well as other funds similarly situated" (Pet. Br., p. 20). But there is no evidence in this record that the plan would be endangered or even noticeably affected by such a ruling. The record does not reveal how many veterans entitled to reemployment rights the Company has on its payroll or its retired list, what their cumulative length of military service might be, or what any increased pension will cost the fund. Indeed, there is no indication even of the number of employees the Company has. The record is silent about the assets of the fund and its income. Although the Company was in a position to produce the evidence to support its claim, it did not do so.

Furthermore, the judgment in the instant case runs against Alabama Power Company as the employer liable under the Act, and thus is no different from any other liability judgment."[47] Moreover, under

[47] "Having failed to see that contributions for a past period were made when [Mr. Davis] was 'restored,' [Alabama Power Company] was in violation of the Act and, under the facts here, this caused damage * * * for which [Davis] is entitled to judgment." *Palmarozzo* v. *Coca-Cola Bottling Co.*, 69 CCH Labor Cases ¶ 13,095, p. 25,495, decided October 18, 1972 (S.D.N.Y.), affirmed, 490 F. 2d 586 (C.A. 2), certiorari denied, 417 U.S. 955. Cf. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1044 (C.A. 4).



ERISA (see note 37, *supra*) the company can shift its liability to the pension fund and amortize the funding of that liability over a period of 40 years (29 U.S.C. 1082(b)(2)(B)(i)), with an additional 10-year grace period possible if approved by the Secretary of Labor (29 U.S.C. 1084(a)). Thus, any underfunding of the pension plan caused by a ruling in Davis' favor need not be immediately remedied; rather the funding can be spread out over a lengthy period of time which will greatly alleviate any alleged burden placed on the employer and the fund."[48]

[48] The regulations promulgated pursuant to ERISA provide in pertinent part that "Nothing in this section [pertaining to hours worked] shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States * * *. Thus, for example, nothing in this section shall be construed as denying any employee credit for an 'hour of service' if credit is required by separate federal law. Furthermore, the nature and extent of such credit shall be determined under such law" (29 C.F.R. 2530.200b–2(c); 40 Fed. Reg. 41662).

The regulations also provide the following example: "During a [pension] computation period, an employee worked 40 hours a week for the first 2 weeks. The employee then began serving on active duty in the Armed Forces of the United States, which service occupied the remaining fifty weeks of the computation period. The employee would be credited with 80 hours * * * plus such credit as may be prescribed by separate Federal laws relating to military service. The nature and extent of the credit that the employee receives upon his return and the purpose for which such credit is given *e.g.*, the percentage of his or her accrued benefits derived from employer contributions which are nonforfeitable (or vested), will depend upon the interpretation of the federal law governing veterans' reemployment rights" (29 C.F.R. 2530.200b–2(d)(4); 40 Fed. Reg. 41662).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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